Dora bte Hj Adenan v Delta Finance Bhd

HIGH COURT (KUCHING) — BANKRUPTCY PETITION NO KG 291 OF 1993(III)
ELIZABETH CHAPMAN JC
23 SEPTEMBER 1994

Bankruptcy *— Notice — Service of — Server of notice in business of delivering court process — Fee received on case to case basis — Whether server proper person to serve notice — Whether proper service — Bankruptcy Rules 1969 rr 97 & 109*

Delta Finance Bhd ('the creditor') presented a creditor's petition against Dora bte Hj Adenan ('the debtor'). The bankruptcy notice was personally served on the debtor by one Gadion a/k Laga ('the server'), who acted under the direction of the creditor's solicitors. The server was carrying on business under the name of Ken's Express Services, and his business involved, inter alia, delivering court process to persons directed by his clients in return for a fee. The issue which arose was whether the service of the bankruptcy notice was proper pursuant to rr 97 and 109 of the Bankruptcy Rules 1969 ('the Rules').

Held, striking out the creditor's petition:

(1) Pursuant to r 97 of the Rules, the service of a bankruptcy notice shall be proved in like manner as is prescribed for the service of a creditor's petition. Rule 109 in turn provides that a creditor's petition could be served either by a court's officer, the creditor, his solicitor, or a person in their employment. Thus, whether the bankruptcy notice was properly served would depend on whether the server was 'a person in their employment' within the meaning of r 109.

(2) The phrase 'a person in their employment' in r 109 means a person in the permanent employment of the creditor or his solicitor, and not one who receives a commission on a case to case basis, as in this case. The rule must be strictly complied with, as the object of the rule was to ensure that a responsible person should effect the service and affirm the affidavit of service.

[Bahasa Malaysia summary

Delta Finance Bhd ('pemiutang') telah mengemukakan suatu petisyen pemiutang terhadap Dora bte Hj Adenan ('penghutang'). Notis kebankrapan telah disampaikan secara diri kepada penghutang oleh seorang yang bernama Gadion a/k Laga ('penghantar'), yang bertindak di bawah arahan peguamcara pemiutang. Penghantar tersebut telah menjalankan perniagaan di bawah nama Ken's Express Services, dan perniagaannya melibatkan, antara lain, penyampaian proses mahkamah kepada orang seperti yang diarahkan oleh pelanggannya atas balasan suatu fee. Isu yang timbul ialah sama ada penyampaian

notis kebankrapan tersebut adalah betul menurut kk 97 dan 109 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah-Kaedah itu').

Diputuskan, membatalkan petisyen pemiutang itu:

(1) Mengikut k 97 Kaedah-Kaedah itu, penyampaian notis kebankrapan harus dibuktikan dengan cara yang sama seperti yang telah ditetapkan untuk penyampaian petisyen pemiutang. Kaedah 109 seterusnya menyatakan bahawa petisyen pemiutang boleh disampaikan sama ada oleh seorang pegawai mahkamah, pemiutang, peguamnya, ataupun seorang yang di bawah penggajiannya. Maka, sama ada notis kebankrapan tersebut telah disampaikan dengan betul atau tidak bergantung kepada sama ada penghantar yang berkenaan adalah 'seorang yang berada di bawah penggajian mereka' di dalam maksud k 109.

(2) Frasa 'seorang yang berada di bawah penggajian mereka' di dalam k 109 bermaksud seorang yang di dalam penggajian tetap pemiutang atau peguamnya, dan bukan seorang yang akan menerima komisyen dari satu kes ke kes yang lain, seperti dalam kes ini. Kaedah tersebut harus dipatuhi betul-betul, kerana tujuan kaedah itu ialah untuk memastikan bahawa seseorang yang bertanggungjawab akan melaksanakan penyampaian dan mengikrar afidavit penyampaian.]

[*Editorial Note*: The petitioning creditor has appealed to the Court of Appeal vide Civil Appeal No Q–03–14–94.]

Notes

For cases on service of bankruptcy notices, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1406–1408.

Case referred to

Lancaster, ex p Lancaster, Re (1876) 3 Ch D 498 (distd)

Legislation referred to

Bankruptcy Rules 1969 rr 97, 109
Bankruptcy Rules 1870 r 61 [Eng]

Wong Siong Tung (Loke, King & Co Advocates) for the petitioning creditor.

Kho Fui Long (Assistant Official Assignee) for the Official Assignee.

Cur Adv Vult

Elizabeth Chapman JC: The issue before this court is whether service of the bankruptcy notice dated 20 July 1993 in these proceedings is proper. The bankruptcy notice was served by Gadion a/k Laga who has been carrying on business under the name and style of Ken's Express Services. The nature of his business involved providing delivery services which

include, amongst other things, delivering court process to persons directed by his clients in return for a fee. A

In this instant case, he was retained by Messrs Loke, King & Co Advocates to effect personal service of the bankruptcy notice on the debtor and the dispute here is whether Gadion a/k Laga was in their employment within the meaning of r 109 of the Bankruptcy Rules 1969. Rule 109 reads as follows: B

> A creditor's petition shall be personally served and service shall be effected by an officer of the Court or by the creditor or his solicitor or a person in their employment by delivering a sealed copy of the petition to the debtor.

It is prescribed in r 97 that a bankruptcy notice shall be served and service thereof shall be proved in like manner as is prescribed for the service of a creditor's petition. It was argued by learned counsel for the petitioning creditor that if a person was authorized to effect personal service, he was in their employ by virtue of r 109 and that employment meant permanently employed or engaged for any one particular transaction. C D

In my view, the intended meaning of 'a person in their employment' in r 109 of the Bankruptcy Rules 1969 would mean a person in the permanent employment of the creditor or his solicitor, and not one who would receive a commission on a case to case basis as is the case here. The rule must be strictly complied with, as I think the object of the rule is to secure that a responsible person shall effect the service and make the affidavit of service. E

Re Lancaster, ex p Lancaster (1876) 3 Ch D 498 which was referred to by learned counsel in support of his contention, can be distinguished from the present case as in *Re Lancaster,* the contention was that the service by the clerk of the London solicitor's country agent was not proper service as r 61 of the Bankruptcy Rules 1870 provides that a debtor's summons or a petition shall be served upon the debtor by an officer or a bailiff of the court, or by the creditor or his attorney. Bacem CJ, at p 500 said: F

> The reasonable construction is that the attorney is to perform this business in the same way that he performs any other business which is intrusted to him by a client. A London solicitor naturally employs a country solicitor as his agent to do business for him in the country, and the country solicitor employs a clerk to act for him. G

In the case before this court, a private individual who provides delivery services was retained by the advocate firm to serve the bankruptcy notice, as distinct from the clerk of the advocate firm. This cannot, in my view, be considered proper service within the meaning and intent of r 109 and accordingly, I hold that service in this case was not proper and disallow making an order for a receiving order and adjudicating order. The creditor's petition is therefore struck out and the deposit is ordered to be refunded. H I

Order accordingly.

Reported by Isabel Liong